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ABSTRACT

This viewer's guide is designed to encourage discussion about the issues covered in the four-part public television series "Liberty & Limits: 'The Federalist' Idea 200 Years Later" that aired during 1997. The series examines whether the current U.S. political system still matches the vision of its founders. The guide offers: an essay on each program in the series, discussion questions, suggestions for further reading, relevant organizations, and web sites. The essays in the guide elaborate further on program themes and may be the subject of discussions in educational settings such as book groups, adult education seminars, and college classes. This guide includes four essays, each of which reflects on an earlier broadcast: (1) "The President vs. Congress" (Donald L. Robinson), which discusses "Constant Combatants: the President and Congress." (broadcast on April 11, 1997); (2) "Forgotten Federalism" (Joan I. Greco), which discusses "Whose Law, Whose Order?" (broadcast on April 18, 1997); (3) "New Technology, New Dilemmas" (Joan I. Greco), which discusses "Privacy and Security on the Eve of the Millennium" (broadcast on April 25, 1997); (4) "Running for Political Office in an Age of Television, PACs, and Polls" (Kathleen M. Sullivan), which discusses "The Price of Politics: Electing Our Leaders" (broadcast on May 2, 1997). (BT)

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VIEWER'S GUIDE

Liberty Limits

The Federalist Idea

200 Years Later

★ ★ ★ ★ ★

A FRED FRIENDLY SEMINAR

"IF MEN WERE ANGELS, NO GOVERNMENT WOULD BE NECESSARY. IF ANGELS WERE TO GOVERN MEN, NEITHER EXTERNAL NOR INTERNAL CONTROLS ON GOVERNMENT WOULD BE NECESSARY. IN FRAMING A GOVERNMENT WHICH IS TO BE ADMINISTERED BY MEN OVER MEN, THE GREAT DIFFICULTY LIES IN THIS: YOU MUST FIRST ENABLE THE GOVERNMENT TO CONTROL THE GOVERNED; AND IN THE NEXT PLACE OBLIGE IT TO CONTROL ITSELF."

— *James Madison, The Federalist* No. 51

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LIBERTY & LIMITS
"THE FEDERALIST" IDEA 200 YEARS LATER
A Fred Friendly Seminar

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Liberty & Limits

The Federalist Idea 200 Years Later

★ ★ ★ ★ ★

A Fred Friendly Seminar

Dear Colleague,

Few documents are more revered and influential in American life than the Constitution. Yet two hundred years ago, when the Constitution was sent to the states for ratification, it was the subject of heated contention; ratification was far from assured. With the nation's future in the balance, James Madison, Alexander Hamilton, and John Jay felt compelled to write *The Federalist Papers*, eighty-five "letters to the editor" to rally support for the new Constitution.

What is most striking in reading *The Federalist Papers* is the continuing relevance of the issues with which Hamilton, Jay, and Madison grappled. Would the President merely replace the English king as a despot? Would government tread too heavily on hard-won liberties so recently secured? Would the power of "factions" undermine the ability to govern in the interests of all the people? To gain backing for the new Constitution, these three men, under the common pseudonym Publius, discussed the benefits of a strong federal government; the relationships among the three branches of government; the need for an independent judiciary; the dangers of political factions and how to ameliorate them; and whether the federal legislature would be likely to serve the wealthy and the powerful at the expense of everyone else.

There is no question that the debate over the proper nature and limits of the federal government is as important and passionate as ever. Today, with Congress handing massive federal programs back to the states, with federal regulations under fierce attack, with private militias denying and defying the authority of the national government, with the influence of political action committees (PACs) and "soft money" undermining our confidence, the issues the *Federalist* authors grappled with dominate our own political scene.

Using The Fred Friendly Seminars' unique Socratic dialogue format of hypothetical situations and role-playing, LIBERTY & LIMITS: "THE FEDERALIST" IDEA 200 YEARS LATER challenges a distinguished group of panelists to explore some of today's most pressing political issues against the backdrop of the wisdom contained in *The Federalist Papers*. Starting with concrete dilemmas with which audiences can easily identify, the hypothetical situations develop increasing ethical, legal, and moral complexity until panelists are compelled to make decisions where the "right" choices are not clear. Our objective is not to change minds or support a particular point of view, but to open minds and make the agony of decision-making so intense that you can only escape by thinking. We hope you think we have succeeded.

Sincerely,

Fred Friendly

Ruth Friendly

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INTRODUCTION

From the resurgence of organized militias to the sweeping changes enacted by the 104th Congress' Contract with America, it has become increasingly clear that many Americans are dissatisfied with the federal goverment. They feel it is too large, too intrusive, and too beholden to special-interest groups. Yet, others feel the system does not do enough.

The controversy over federal control is not new. It is as old as our government itself. From October 27, 1787 to August 16, 1788, three of America's founding fathers—Alexander Hamilton, James Madison, and John Jay—raised these issues in a series of brilliant political essays first published in New York City newspapers. These writings, which came to be known as *The Federalist Papers*, were designed to rally support for a strong Constitution and a central authority whose powers were bound by a system of careful checks and balances.

LIBERTY & LIMITS: "THE FEDERALIST" IDEA 200 YEARS LATER is a four-part public television series that examines whether America's current political system still matches the vision of its founders. Using hypothetical situations and role-playing, LIBERTY & LIMITS features some of the most respected political and legal minds in the nation today, debating the same issues of governmental control our country faced over 200 years ago.

The first program in the series, Constant Combatants: The President and Congress, looks at the balance of power between the branches of government in the conduct of foreign policy. The second, Whose Law, Whose Order? examines federal versus state authority in making and enforcing laws. The third, Privacy and Security on the Eve of the Millennium, discusses highly charged issues concerning privacy in the digital age. The final program in the series, The Price of Politics: Electing Our Leaders, debates the fairness and responsiveness of our electoral system.

In *The Federalist* No. 51, James Madison wrote, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." This series shows the continuing controversies surrounding the nature and use of federal power in public and private life, and the competing interests and ideas that shape public policy-making in our country.

HOW TO USE THIS GUIDE

This Viewer's Guide is designed to encourage discussion about the issues covered in the four-part television series LIBERTY & LIMITS: "THE FEDERALIST" IDEA 200 YEARS LATER.

The Viewer's Guide offers the following components:

- an essay on each program in the series; these essays, which elaborate further on program themes, may be the subject of discussions in educational settings such as book groups, adult education seminars, and college classes;
- thought-provoking discussion questions;
- a resources section including suggestions for further reading, relevant organizations and web sites.

We invite educators to photocopy the guide for use in educational settings.

PROGRAM SCHEDULE

Please check local listings for broadcast times and any scheduling changes.

Constant Combatants: The President and Congress	**April 11, 1997**
Whose Law, Whose Order?	**April 18, 1997**
Privacy and Security on the Eve of the Millennium	**April 25, 1997**
The Price of Politics: Electing Our Leaders	**May 2, 1997**

The Federalist Papers Nos. 10, 23, 51, 52, 55-58, 59-61 and 75 are relevant to this program.

CONSTANT COMBATANTS: THE PRESIDENT AND CONGRESS

BROADCAST: APRIL 11, 1997
(check local listings)

MODERATOR: Charles R. Nesson

PANELISTS: Bob Barr, Joseph A. Califano, Jr., James Fallows, Leslie H. Gelb, William H. Gray, III, Alexander M. Haig, Jr., Richard C. Holbrooke, Kati Marton, Warren B. Rudman, Michael J. Sandel, Antonin Scalia, William H. Webster

The President vs. Congress

BY DONALD L. ROBINSON

CONSTANT COMBATANTS: THE PRESIDENT AND CONGRESS vividly shows how the conduct of foreign policy puts a great strain on a constitutional system.

There is no doubt, as the authors of *The Federalist Papers* make clear, that the framers intended to build checks and balances into the powers over foreign relations, so that only by the joint cooperation of Congress and the president could the nation enter into any large undertaking abroad. But the unguarded language Hamilton uses in *The Federalist* No. 23 (see sidebar), reflects the volatile emotions that surface when the nation must come to grips with a foreign danger. A president, in his anxiety for the nation's safety, is sorely tempted to act alone, and the first instinct of the people in such a situation is to support him. Gradually, however, passions cool, and the mechanisms of the Constitution begin to assert themselves.

Although the Constitution makes no distinction between domestic and foreign affairs, the system operates differently in the two arenas. In domestic affairs there is an equilibrium that protects liberty and keeps executive power in check. The president leads the administration, and when he gives voice to the people's wishes, he can be very strong. But Congress controls the purse strings, and the courts stand ready to protect individual rights against officials who abuse their authority.

When dealing with other nations, however, the president has far more leeway. We assume that he knows more than the rest of us because his appointees, stationed abroad, conduct day-to-day relations with foreign governments. Most of these contacts are secret, which gives the president a great advantage. In addition, as commander in chief, he has control over the nation's armed forces. Combining these powers, the president is often able to create a situation before Congress even knows that a crisis is brewing.

In CONSTANT COMBATANTS, the evolution of the crisis between Krussia and Nukraine demonstrates this dynamic. Right at the outset, the president takes the initiative. The president has a superior position in the early stages of the crisis, based on his information about developments and his immediate contact (through trusted aides) with other leaders. Some of the president's top aides mention an obligation to keep Congress informed. Others in the administration are not as enthusiastic.

Pretty soon, the question of informing Congress becomes moot. Members of Congress start hearing from journalists or from constituents, who may be aroused by ethnic ties to the affected region, or by business interests. At this point, a struggle for control breaks out between the branches. Certain that they know the national interest, the president and his aides want to be free from interference in a delicate situation such as this. Members of Congress, however, insist on being consulted, lest the administration commit American power and prestige carelessly.

CONSTANT COMBATANTS: THE PRESIDENT AND CONGRESS illustrates the vitality of the safeguards set in place two centuries ago.

Donald L. Robinson is professor of government at Smith College. He is the author of books on the constitutional setting of the presidency and on slavery in the making of the Constitution, and he has recently completed work on a documentary history of the Constitution of Japan (Princeton University Press, 1997).

DISCUSSION QUESTIONS

1. What are the president's powers and responsibilities, under the Constitution, in the conduct of foreign relations and national security policy? How much leeway does he have?

2. What powers does Congress have in the conduct of foreign relations and national security policy? What factors constrain the exercise of these powers?

3. What impact do other players have in this arena, such as the news media (reporters and editorial journalists); scholars and other influential intellectuals; the courts; and the public (through polls and other means of making itself felt)?

4. How important are moral considerations in the conduct of foreign relations and national security policy? How much does it matter whether individuals in the government take their constitutional responsibilities seriously? To whom, or to what, ought public officials to be loyal?

What makes the president watchful is not some argument about constitutional obligation. It is the fact (as Madison wrote in *The Federalist* No. 51) that members of Congress have the "constitutional means and personal motives" to resist presidential power.

The situation in the world has changed a great deal since the founding of the United States two centuries ago. We now have far-flung treaty obligations and a sense of responsibility in distant places. In addition, the president has been provided with standing armed forces he can deploy rapidly. These developments have taken us a long way from the days when President Washington warned against "foreign entanglements." President Franklin D. Roosevelt, as recently as the late 1930s, had to persuade Congress to give up its isolationism before he could prepare the nation for war against Nazi Germany. Now presidents have troops and weapons readily available, because most of us have accepted the idea that we must be prepared for dangers that may loom quickly in Europe and Asia.

These modern realities have greatly strengthened the president's hand in foreign relations. Even so, Congress is equipped by the Constitution to fight back, to maintain its position at the center of the affairs of government. Because its members are frequently elected, Congress holds the key to great power in a democracy: the authority to speak for the people. It can call administration officials to account in public hearings. It controls the government's expenditures. Ultimately it has the power to impeach a president who ignores the Constitution or seriously violates the laws.

In modern times, we tend to think of the Constitution as a set of written guarantees, spelling out our rights. But it is worth remembering that the United States Constitution as originally framed and ratified had no Bill of Rights. Those who wrote the Constitution thought of it primarily as a frame of government, establishing institutions and procedures for governance. Because they knew that monarchs had abused power, the framers insisted that leading officials be elected, so that government would rest ultimately on the will of the people. Because they knew that democratic majorities could be misled by passion and prejudices, they divided the authority of government among three branches and constructed its internal mechanisms to ensure that leaders could hold one another to account.

Americans greatly admire the system built by the framers, and for good reason. It has preserved our liberty through turbulent changes. But the system is not tidy, and there is no guarantee that it will last forever. Its resilience depends on tolerance and mutual respect among governing officials and on the vigilance of the people, informed by a free and vigorous press.

National Government and National Defense

In making the case for a national government (*The Federalist* No. 23), Alexander Hamilton uses strong language. The powers needed to provide for the national defense, he writes, "ought to exist without limitation. . . The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." Hamilton clearly does not mean that these "unlimited" powers should be committed solely to the president. Indeed, the Constitution distributes them, making the president commander in chief of the armed forces and chief diplomat, but giving Congress power to declare war, raise armed forces, ratify treaties and confirm the appointment of ambassadors. Hamilton cautions that the "history of human conduct" does not warrant committing the conduct of our relations with the rest of the world, so "delicate and momentous," to the "sole disposal" of an elected official (*The Federalist* No. 75).

UPI/CORBIS-BETTMANN

Secretary of State Dean Rusk faces the Senate Foreign Relations Committee during hearings on Vietnam in 1968.

The Federalist Papers Nos. 10, 17, and 44-46 are relevant to this program.

WHOSE LAW, WHOSE ORDER?

BROADCAST: APRIL 18, 1997
(check local listings)

MODERATOR: Charles J. Ogletree, Jr.

PANELISTS: Bob Barr, Barbara Boxer, William J. Bratton, Alan Brinkley, Reverend Calvin O. Butts, III, Jim Dupont, Michael O. Leavitt, Oliver "Buck" Revell, Richard W. Roberts, Antonin Scalia, Charles E. Schumer, Nadine Strossen, Fred Thompson, William H. Webster

Forgotten Federalism

BY JOAN I. GRECO

A local sheriff refuses to conduct a federally required background check of a gun purchaser, claiming that his objection is *not* with gun control, but with the fact that the federal government directs the actions of state employees. To contemporary eyes, the sheriff's argument may seem obscure, even baffling. To the authors of *The Federalist Papers*, however, the sheriff's position would represent the continuation of a debate they took part in over two hundred years ago.

The authors of *The Federalist Papers* had a lot of explaining to do. This awesome work, which consists of 85 papers produced in frantic haste in the midst of a fierce political battle, had an entire, radically new Constitution to defend, yet it contains some of the wisest observations on government ever written. The authors discoursed on matters as diverse as the value of a bicameral Congress; the appropriateness of a four-year term for President; the role of the Senate in ratifying treaties; and the judiciary's responsibility to uphold the Constitution. But most of all, the papers were fundamentally a powerful plea for acceptance of a *federal* republic—one in which each of the sovereign states would cede some of its powers in order to gain the benefits of a strong national government. The papers are full of indictments of the weakness of the Articles of Confederation; briefs on the necessity of a strong federal government to obtain peace at home and respect abroad; and predictions (which may or may not have matched the authors' true hopes) that the proposed federal government should not be feared because "[i]t will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach on the State authorities." (No. 17, Hamilton)

Of course, the fledgling federal government that Hamilton, Madison, and Jay sought to defend has grown monumentally over the last two centuries. Federal laws and regulations touch almost every aspect of our lives. We can debate whether or not the *Federalist* authors could have imagined, or would have welcomed, these developments, but they would have undoubtedly been surprised at how few Americans today understand, or even care about, the basic tenet of federalism that was at the heart of their writings.

Whereas most Americans are eager to debate whether we should have more or less control of guns, more or less harsh penalties for possession of marijuana, more or less regulatory protection of the environment, or more or fewer restrictions on assisted suicide, not many people concern themselves with the question—fundamental to those who were debating the new Constitution—of whether these issues should be regulated by the federal government or by the states. For example, in the case of our local sheriff, what matters to most Americans is whether the background check takes place, not whether it has been mandated by federal or state law.

A local protest following the Bureau of Alcohol, Tobacco, and Firearms' disastrous raid on the Branch Davidian compound near Waco in 1993.

Unlike many contemporary Americans, the authors of *The Federalist Papers* and the framers of our Constitution envisioned a federal government whose powers would be substantial, whose laws would be supreme, but whose areas of concern would be *limited*. This basic federal structure is still embedded in our Constitution; but as a result of having lived through a Civil War, two World Wars, and numerous economic upheavals, the list of federal responsibilities expanded—for example, with the protection of civil rights—and the meaning of "interstate commerce," a federal concern, came to include every commercial transaction in the nation. More recently, as our federal officeholders have sought to address the

Joan I. Greco (Harvard Law School '84; Law Clerk to Justice Sandra Day O'Connor, 1986-87) is a senior writer for The Fred Friendly Seminars.

immediate concerns of their constituents, the federal government has made federal crimes out of matters that in the past were solely under state and local control, such as drug possession, domestic violence, even carjacking.

What difference does it make whether an issue is handled at the state or federal level? Uniform national standards assure the free flow of commerce. Might they also prevent states from competing for business by lowering their environmental or worker health and safety regulations below the federal level? Can the "federalization" of an issue, such as drugs, be an effective way for the federal government to use its power and resources to battle a national problem? And isn't federal power required to protect local minorities who might not otherwise receive equal treatment under the law?

But "federalization" can have its costs. Might the imposition of one national standard prevent states from designing different solutions based on their local conditions and concerns? Does the designation of new federal crimes divert federal resources from core responsibilities such as the protection of civil rights? Moreover, federal power is, by definition, both stronger and further removed from the individual than state and local power. Could this be part of the reason why some Americans regard the federal government with fear and hostility?

As we look toward a new century, the nation struggles with the challenges of providing Americans with world-class educations, access to health care, freedom from drug abuse and violence, and a means of escape from poverty. To meet these challenges effectively, we must not only consider the results we seek, but also whether, for each aspect of the problem, the federal government or state governments are best able to attain those results. Unless we think hard about the advantages, and the costs, of handling an issue at the federal or state level, we are unlikely to reap the full benefits of the system envisioned by the *Federalist* authors and the framers of the Constitution.

DISCUSSION QUESTIONS

1. Which of these matters, or which aspects of these matters, are best handled by the federal government? Which are best handled by state and local governments? Why?: Gun possession; drugs; education; environmental protection; civil rights; welfare; street crime; domestic violence.

2. Should the federal government be able to withhold federal funds for one matter (such as prisons) if a state refuses to follow federal policy on *another* matter (such as gun sales)?

3. If a state allows the "medicinal" use of marijuana, should the federal government prosecute those prescribing and using marijuana under the state law, for violating *federal* drug laws?

4. How should government—and individuals—deal with those who profess a fear of and hostility toward the federal government? Is a radio talk show host who speaks of the federal government as an enemy voicing his listeners' legitimate concerns, or is he fueling dangerous misunderstandings? In either case, how should the institutions that are being attacked, or individuals who disagree, respond?

Federalism and Gun Control

In efforts to reduce violence in and near schools, Congress banned firearms possession in every school area in the country with the Gun-Free School Zones Act of 1990. A student charged under the law challenged its constitutionality, and in 1995 the Supreme Court, by a narrow 5-4 majority, agreed. The case, *U.S. v. Lopez,* marked the first time since 1936 in which the Court overturned a federal law on the grounds that it exceeded the Congressional commerce authority. The majority decision asserted that such issues of law enforcement are strictly matters of state jurisdiction. The main dissenting opinion cited numerous studies that connect educational opportunities to local and national commerce; this direct relationship, argued the dissent, permits Congress to legislate school safety.

Big Government: Pro and Con

Professor Alan Brinkley

"Such reforms [reducing the scope of the federal government] would move the United States toward becoming a balkanized republic, with fifty semiautonomous governments. . . . They would accentuate the regional, economic, religious, ethnic, and racial differences that already divide us. They would leave us impotent to confront unforeseen emergencies and unexpected problems." — from "The Assault on Government," *New Federalist Papers*

Justice Antonin Scalia

"A federal system will not work when the people have come to look upon the national government as the solution of first resort, and that's where I'm afraid we are. . . . What is out of kilter is that the people tend to look to Washington immediately instead of looking to their state capitals first."

The Federalist Papers **No. 1, 51, 57, 84 are relevant to this episode.**

PRIVACY AND SECURITY ON THE EVE OF THE MILLENNIUM

BROADCAST: APRIL 25, 1997
(check local listings)

MODERATOR: Arthur R. Miller

PANELISTS: Ernie Allen, Zoe Baird, Stephen Breyer, Stephen L. Carter, Amitai Etzioni, Barney Frank, James Gleick, Jamie S. Gorelick, Patrick Leahy, Bill McCollum, Jerry Nachman, Jeanine Pirro, Robert Ellis Smith, Nadine Strossen

New Technology, New Dilemmas

BY JOAN I. GRECO

At the time *The Federalist Papers* were written, most members of a community knew each other through personal judgment and long experience. Travel was onerous; relocation was a serious matter. Today, America is much larger in its geographic size and population, and Americans are incredibly mobile, but with that size and mobility comes a cost: neighbors may be strangers to each other. Technological advances have not only increased our mobility, however; they also offer us new ways to get to know our neighbors. Like the participants in PRIVACY AND SECURITY AT THE END OF THE MILLENNIUM, we can check out the new Little League coach by demanding that he or she be fingerprinted; we can hire an "information broker" to gather information from computer databases on job applicants; we can require our state to post information whenever a convicted "sexual predator" moves into town. How much of our personal privacy are we willing to give up—and how much of others' privacy are we willing to invade—for the sake of our security?

At times like this, when technology promises (or threatens) to reshape our basic understandings of privacy, security, and community, it is especially important to seek out an historical perspective. At first glance, *The Federalist Papers* seem to have no connection to these issues. Hamilton, Madison, and Jay were arguing for a new national government. They were not concerned with matters of personal security, which they assumed would be handled locally. But their words and their actions in the creation of *The Federalist Papers* reveal these great political thinkers' opinions on privacy, trust, and the good and bad sides of human nature—opinions that can be quite useful in helping us answer the questions our brave new world presents us.

We can have little doubt that the authors understood the value of privacy. *The Federalist Papers* themselves were published under the pseudonym "Publius." Perhaps the uses the *Federalist* authors had for anonymous communication should be kept in mind when individuals seek to communicate through encrypted electronic messages, or to protect a sphere of privacy from employers or databanks.

To a degree, the *Federalist* authors argued for trust of one's fellow Americans. In defending the new Constitution against predictions that those in the federal government would take every opportunity to abuse their powers, the *Federalist* authors reminded their readers that our basic form of government—a representative republic—required a greater faith in human nature than did authoritarian governments. "Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another." (No. 57, Madison) One might point to this faith in human nature to argue that trust in one's neighbor should not be replaced by extensive data-gathering. On the other hand, one could use the same observation to argue that we should have faith that those with access to data on others will use the information prudently.

Perhaps the *Federalist* observations most relevant to the issues raised by this program, however, were not those that

DISCUSSION QUESTIONS

1. Would you prefer to live in a town where everyone who worked with children was fingerprinted? Would you prefer to live in a town in which *everyone* in the town was fingerprinted?

2. What if the principal of Unity High School learned through an "information broker" that the best-qualified applicant to be the new gym teacher had been convicted of possessing a small amount of marijuana 15 years ago? Or that an applicant for school counselor had been married and divorced four times? Or that an applicant for a position that will involve handling school funds had once defaulted on a mortgage? Should this information affect the principal's decision? Should the information be available in the first place?

3. What information about you should your neighbors or employer be able to obtain easily? What sort of information should remain private? How can we protect that privacy?

4. Should juvenile criminal records remain confidential? Should there be a limit to the amount of time a person is labeled a "sexual predator" under a notification statute, if the person commits no other offenses?

Joan I. Greco (Harvard Law School '84; Law Clerk to Justice Sandra Day O'Connor, 1986-87) is a senior writer for The Fred Friendly Seminars.

professed a faith in humanity, but rather those that recognized the need for a government structure that kept citizens' less-than-noble impulses in check. Hamilton, Madison, and Jay recognized the inevitability of faction; the necessity of government power to maintain "the security of liberty" (No. 1, Hamilton); and the dangerous temptations that government power itself would create.

The *Federalist* authors thus well understood a fact that is especially important for us in determining where to draw the line in protecting privacy and security. They understood that the powers that kept the darker side of human nature in check must themselves be kept in check. "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." (No. 51, Madison).

These observations are as applicable to our current questions as they were to the Founders. It may be foolish not to use the information and technology available to us to enhance the security of our children and ourselves. But would it not also be foolish to assume that those with the ability to invade our privacy will always use their powers prudently? Mustn't the information-gathering powers that can help control crime themselves be controlled? In order to do that wisely, we must challenge ourselves, and our elected representatives, with the questions our panelists faced in this program.

Some local laws require that offenders be identified when they are released into a community.

Privacy and Government: Two Views

Less Privacy Is Good For Us (And You)

"If we do not significantly improve our ability to reduce violent crime, sexual abuse, and to stem epidemics, an ever-larger number of Americans will demand strong-armed authorities to restore law and order. . . . Let us allow the new capabilities of cyberspace [to] help restore civil order, which is at the foundation of ordered liberties." – Professor Amitai Etzioni, "Less Privacy Is Good For Us (and You)"

In Defense of Privacy

"Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. . . . [T]he right to be let alone—the most comprehensive of rights, and the right most valued by civilized men." – Justice Louis Brandeis, *Olmstead v. United States, 277 U.S. 438 at 473, 478 (1928)*

Privacy Now?

Until recent years, the legal realm of privacy issues generally dealt with the rights of individuals versus the techniques of law enforcement authorities. Today, the "far-reaching means of invading privacy" that Justice Brandeis so feared are available not only to the government, but to unscrupulous cyber-sleuths. "Information brokers" can obtain and share, for a price, just about any computerized information, often in a matter of minutes; some are willing to break hard-to-enforce laws in the process. The following are examples of what is available.

- **Personal health records**
- **Telephone numbers and time of all incoming and outgoing calls**
- **Criminal and civil courtroom proceedings and documents**
- **Electronic mail sent over any computer network**
- **Credit history**
- **Employment history**
- **Property financial information, including taxes**
- **Social security number**

The Federalist Papers No. 10, 51, 52, 55-58 and 59-61 are relevant to this program.

THE PRICE OF POLITICS ELECTING OUR LEADERS

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MODERATOR: Kathleen M. Sullivan

PANELISTS: Stephen Breyer, Joseph A. Califano, Jr., James Fallows, Jack Faris, Kellyanne Fitzpatrick, Barney Frank, William H. Gray, III, Jeff Greenfield, Michael Kelly, Cleta Mitchell, Jerry Nachman, Nelson W. Polsby, Douglas B. Sosnik, Robert Squier, Fred Thompson

Running for Political Office in an Age of Television, PACs, and Polls

BY KATHLEEN M. SULLIVAN

When the Congress of the United States first met in New York City just over two centuries ago, it was composed of only 59 representatives and 20 senators. They traveled long distances by horse and carriage and communicated with their constituencies by slow-moving post. Few members expected to stay in office for many terms. The framers of the Constitution envisioned that this body, while representing its constituents' views, would have enough detachment from immediate public passions to deliberate in the public interest. As James Madison wrote in *The Federalist* No. 10, the citizenry would elect those "whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."

What resemblance does today's Congress bear to the Congress the framers envisioned? Much has changed in two centuries. Today the Senate has grown to 100 members and the House to 435. Because the population has grown much faster, the size of each members' constituency has grown exponentially. Members of Congress today travel by jet and communicate instantly by telephone, television, internet, and fax. They can measure every ripple of public feeling by electronic polls. Continuous television coverage conveys their speeches and votes back to their constituents in turn. Members remain in office far longer: while the turnover rate in the House was above 40 percent for most of the nineteenth century, it has dropped to less than 20 percent for most of the late twentieth century. The power of incumbency has grown: 90 percent or more of House members have won reelection in elections since 1946, and since 1960 more than 70 percent of senators seeking reelection have typically succeeded. The costs of campaigning have escalated dramatically. Today it costs an average of $2 million to run a Senate campaign and $600,000 to run for a seat in the House. A great deal of this money is spent on the expensive television advertising needed to reach today's much larger constituencies. Those who contribute campaign money often expect considerable access and influence on legislation in return. Under such modern conditions, is the deliberative democracy the framers envisioned still possible?

Contemporary critics charge that our electoral system today has departed from the framers' vision in three key ways. First, the critics say that today's representatives are reactive, not deliberative. They live by the polls, not by their conscience about what is right for the country. They have become mere delegates of the people rather than wise trustees of the public good. Second, critics say that tenure in Congress has ceased to be a public service and instead has become a career for professional politicians. Such repeat incumbents, rooted in Washington, lose touch with their own constituencies and with the concerns of ordinary people outside the Beltway. And third, say critics, government is too responsive to "special interests." Madison thought that "factions" could have little effect on the

THE BIG FELLA CAN'T WAIT TO SEE you!!
HE CAN COUNT ON me!
IF YOU OPEN YOUR WALLET!
IF HE OPENS SOME DOORS!
KAL
KEVIN KALLAUGHER/CARTOONISTS & WRITERS SYNDICATE

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national government, because they would be so numerous and varied that they would tend to cancel one another out. But today, advances in communication and transportation have made interest groups' access to the nation's capital quite cheap, and they enjoy an influence on policy that is disproportionate to their numbers.

THE PRICE OF POLITICS: ELECTING OUR LEADERS explores these criticisms and proposed cures. It asks, first, what a hypothetical congresswoman should do when her conscience conflicts with the preferences of her constituents. Some argue that her first duty is to those who sent her to Congress. Others respond that, if members of Congress vote only according to their polls, we might as well dismantle Congress and run the country by electronic plebiscite instead. A related conflict arises when her conscience or her constituents' views clash with the views of groups that contributed financially to her campaign.

The program considers, second, whether members of Congress should be subject to term limits, as are the president and the members of many state legislatures. The framers considered but rejected "rotation" requirements for members of Congress. Today's term-limits advocates, however, say that replenishing Congress continually with new legislators would decrease its responsiveness to special interests and make it more broadly representative. Opponents disagree, arguing that legislative expertise takes time to acquire, and that term limits would "dumb down" Congress, transferring effective power to lobbyists and professional staffs. The Supreme Court held in 1995 that states may not impose term limits on members of Congress because the qualifications set forth in the Constitution—age, citizenship and residency—were exclusive. Thus, congressional term limits today could be imposed only by constitutional amendment.

Third, THE PRICE OF POLITICS explores possibilities for campaign finance reform. The Supreme Court held in 1976 that spending money in political campaigns amounts to "speech" protected by the First Amendment. Under this ruling, contributions to candidates may be limited but political expenditures themselves may not. Thus, candidates, parties, and political action committees may spend virtually unlimited sums. Expenditures may be limited only as a condition of public funding, which under current law applies to presidential but not congressional campaigns. Advocates of campaign finance reform say that candidates spend too much time and energy raising money and that they are too beholden to those who spend money on their behalf. Others are skeptical about spending limits, arguing that much-criticized "special interests" in fact represent real people and that spending limits would only entrench the power of incumbents by making it more difficult for newcomers to mount a challenge.

Campaign Finances

The controversial *Buckley v. Valeo* (1976) Supreme Court decision defined campaign expenditures as free speech, and therefore beyond the reach of the government. As a result, candidates today face no limits on campaign spending. Current donation restrictions apply to individual candidates, but only minimally to political party committees. Contributions to the national parties' non-federal accounts, known as "soft money," are unlimited; these funds are often spent on behalf of individuals. Election spending in the United States for the year 1992 totaled over $3 billion, including $2.2 billion for federal candidates.

Intertwined with these three themes are questions about the roles of today's press and political consultants. Critics of the press say that it is at once too critical of politics and politicians, deterring good people from running for office, and not critical enough, deferring too much to politicians' own "spin." And critics of political consultancy, which has grown into a billion-dollar business, say that it makes candidates mere products to be market-tested rather than the public-minded deliberators the framers anticipated. The press and political advisers, in their own defense, respond that they enhance democracy by making the public more fully informed and politicians more responsive to popular opinion.

Thus, in the two centuries since the Constitution was ratified, the nation has grown and the process of seeking national office has become more expensive and complex. Can the system the framers set in place in the eighteenth century allow for the development of an electoral process that will be both workable and fair in the twenty-first?

DISCUSSION QUESTIONS

1. Can't politics itself correct political problems? If the electorate doesn't like money in politics, why can't it vote for the candidate who declines to take it? Which is more valuable to the candidate—taking the money or the bragging rights to say she didn't?

2. What alternatives would you suggest to the current system of private funding of political campaigns? Public funding with strings such as spending limits attached? Free air time for candidates on broadcasting networks? Bans on political action committees? Would any of these solutions raise troubling concerns about freedom of speech?

3. Would term limits violate the principle that the people are the best judges of who should represent them? If so, should the nation be free to elect a popular president to a third term?

4. Do polls and political consultants help make candidates too responsive to public opinion, at the price of leadership?

RESOURCES

ORGANIZATIONS

The following organizations either serve the entire nation or act as umbrella organizations for local affiliates.

American Library Association
50 E. Huron Street
Chicago, IL 60611
(312)944-6780

Represents public, school, academic, state, and special libraries. Its mission is to advocate for the American people's right to a free and open information society and the highest quality library and information services.

Great Books Foundation
35 East Wacker Drive, Suite 2300
Chicago, IL 60601-2298
1-800-222-5870
Contact: Gary Schoepfel, Adult Program Director

Great Books discussions provide an opportunity for reflection on important ideas, and provide a public forum for exchanging views. The Foundation, nine Great Books Councils, and some of the 2,000 Great Books groups across the country will be conducting discussions of *The Federalist Papers* following the PBS airing of LIBERTY & LIMITS. *Federalist Paper* No. 10 is being made available by the Foundation.

League of Women Voters of the United States
1730 M Street, NW
Washington, DC 20036
(202)429-1965

A nonpartisan, voluntary organization of citizens (men and women) that promotes political responsibility through informed and active participation in government; acts on selected government issues.

PUBLICATIONS

Adler, David Gray and Larry N. George, eds. *The Constitution and the Conduct of American Foreign Policy*. Lawrence: University Press of Kansas, 1996.

Biskupic, Joan and Elder Witt. *Guide to the U.S. Supreme Court*. Third Edition. Congressional Quarterly, Inc.: Washington, DC, 1997, pp. 69-232; 573-588.

Bradley, Bill. "The Politics of Money." *The Houston Chronicle*, July 14, 1996, p. 1C.

*Brinkley, Alan, Nelson W. Polsby, and Kathleen M. Sullivan. *New Federalist Papers*, a Twentieth Century Fund Book. New York: Norton, 1997.

Browne, Harry. *Why Government Doesn't Work*. New York: St. Martin's Press, 1995.

Corrado, Anthony. *Paying for Presidents: Public Financing in National Elections*. New York: Twentieth Century Fund Press, 1993.

Davis, Kristen. "Guarding Your Financial Privacy." *Kiplinger's Personal Finance Magazine*, August 1995, pp. 38-45.

Elkins, Stanley and Eric McKitrick. *The Age of Federalism: The Early American Republic, 1788-1800*. New York: Oxford University Press, 1993.

Etzioni, Amitai. "Less Privacy Is Good for Us (and You)." *The Responsive Community*, Summer 1996, pp. 11-13.

Fisher, Louis. *Presidential War Power*. Lawrence: University Press of Kansas, 1995.

Gleick, James. "Big Brother Is Us." *The New York Times Magazine*, September 29, 1996, pp. 130-32.

Greenhouse, Linda. "Statute on Internet Indecency Draws High Court's Review." *The New York Times*, December 7, 1996, p.1.

Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*. Clinton Rossiter, ed. New York: NAL-Dutton, 1961.

Jost, Kenneth. "Testing Term Limits." *CQ Researcher*, November 18, 1994 (Volume 4, No. 43), pp. 1009-1032.

Kamber, Victor. *Giving Up on Democracy: Why Term Limits Are Bad for America*. Washington, DC: Regnery Publishers, 1995.

Koh, Harold. *The National Security Constitution: Sharing Power After the Iran-Contra Affair*. New Haven: Yale University Press, 1990.

Mann, Robert. *The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell, and the Struggle for Civil Rights*. New York: Harcourt Brace & Company, 1996.

Nelson, Michael, ed. *CQ's Guide to the Presidency*. Congressional Quarterly Inc.: Washington, DC: 1989, pp. 153-259; 531-572.

Schlesinger, Arthur M., Jr. *The Imperial Presidency*. Boston: Houghton Mifflin, 1989.

Wayne, Leslie. "Scholars Ask Court to Backtrack, Shutting Floodgates to Political Spending." *The New York Times*, November 10, 1996, section 1, p. 30.

Will, George. *Restoration: Congress, Term Limits & the Recovery of Deliberative Democracy*. New York: The Free Press, 1992.

* The essays in *New Federalist Papers*, like the original *Federalist Papers*, are a defense of representative democracy; they see danger in current efforts to diminish and relocate federal power. Their aim is also to advocate reforms that address modern concerns.

WEB SITES

Look for more information about LIBERTY & LIMITS: "THE FEDERALIST" IDEA 200 YEARS LATER on the World Wide Web at these web sites:

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